No. 805

In the

Supreme Court of the United States

OCTOBER TERM 1963

AKSHUN MANUFACTURING COMPANY, *et al.*,
Petitioners,

v.

NORTH STAR ICE EQUIPMENT COMPANY,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

WILLIAM VANDERCREEK
3315 Daniels
Dallas 5, Texas
Attorney for Petitioners.

WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

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Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Seventh Circuit, which denied petitioner relief under

Federal Rule of Civil Procedure 60(b) of a previous judgment of the Seventh Circuit (set out Appendix A, *infra*), is not reported. The order of the Seventh Circuit on rehearing (set out Appendix B, *infra*) is not reported. The previous judgment from which relief was sought under Rule 60(b) (set out Appendix C, *infra*) is reported at 301 F. 2d 882. The Findings of Fact and Conclusion of Law of the district court in the previous proceeding (set out Appendix D, *infra*) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals which denied petitioner relief under Rule 60(b) from a previous judgment of that circuit was entered July 30, 1963. A Petition for Rehearing was received on August 28, 1963, entertained and ordered filed by the Court on November 5, 1963, and denied on November 5, 1963.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] Seventh Circuit Rule 25 provides that a motion for rehearing be filed within 15 days of the entry of judgment. It is not necessary in the case at bar to determine whether such Rule applies to Motions filed pursuant to Rule 60(b), since the appellate court ordered the Petition for Rehearing filed and entertained such by filing a written order explaining the basis of the Court's previous order denying relief. See *Bowman v. Loperena*, 311 U.S. 262, 266: "* * * the filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof."

RULE INVOLVED

Federal Rule of Civil Procedure 60(b):

> "*Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, suprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) *fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;* (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or *(6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken.* A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, *or to set aside a judgment for fraud upon the court.* Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of reveiw, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." (Emphasis added)

QUESTIONS PRESENTED

I. Whether under Federal Rule 60(b) (3) a petition urging relief because of fraud and misrepresentation is timely when filed less than one year from the date the Court of Appeals denied rehearing and less than six months from the date mandate issued, but more than one year after the Court of Appeal's opinion.

II. Whether Court of Appeals should exercise power to set aside judgment for fraud upon the Court when petition for relief under 60(b) offers documented and substantial proof that the exhibit in a patent case on which appellate court's opinion was expressly based was a fradulent exhibit, *viz*, respondent successfully asserted in brief before appellate court that their ice removal tool was identical to Exhibit 21 and that such tool was materially different than patented tool; evidence on 60(b) motion established that the Exhibit 21 was not the tool used in Respondent's machines, and that the actual tools used were identical to petitioner's patented tools.

III. Whether the matter set forth in Question II constitutes a bisis for relief under Rule 60(b) (6).

STATEMENT

In the Seventh Circuit Petitioners filed under Rule 60(b) a petition seeking relief from a final judgment rendered by that Circuit in a previous patent infringement suit. (The previous judgment is set out in Appendix C, *infra.)* The contents of the petition established in uncontrovertible detail that fraud had been perpetrated by the respondents. To appreciate the materiality and nature of the fraud, it is necessary to note briefly certain facts underlying the previous patent infringement suit. Respondents instituted a declaratory judgment proceeding to declare two patents owned by Petitioner to be invalid and not infringed. One of the patents concerned a two-function knife used in removing ice formed on the inside surface of a cylindrical drum in a commercial ice-making machine. Petitioner counter-claimed for damages due to infringement and for injunctive relief. The district court made findings of fact and conclusions of law pursuant to Rule 52. (Findings of Fact and Conclusions of Law of the District Court are set out in Appendix D, *infra*) The district court found the knife patent to be valid and to be infringed by the respondent. The district court further found that the respondent came into court with unclean hands and was acting in bad faith and "deliberately and fraudulently appropriated the improvement (represented

by the knife patent)." The Seventh Circuit overruled the trial court's finding that the knife patent was infringed by respondent, by redetermining the factual and functional identity of respondents tools based on Exhibit 21. Petitioner sought certiorari in this Court to review the Court of Appeals determination for assertedly failing to follow Federal Rule 52. This Court denied certiorari 371 U.S. 889.

The language of the Court of Appeals in reversing is particularly signifcant to the instant fraud claim. The decision's basis rests on one single premise—that respondent's knives represented to be identical to Exhibit 21[1] did not have a structural progressive leading portion machined to indent a groove in the ice sheet, as did the patented blade. The Seventh Circuit stated:

> "The evidence on the question of infringement is almost entirely documentary or in the form of physical exhibits. We have before us plaintiff's Exhibit 21, a physical exhibit which illustrates the North Star ice-

[1] The Exhibit 21 had a machined cutting surface which did not have a progressively machined front edge, and although the Trial Court found that this Exhibit 21 performed "the same function, for the same purpose, to accomplish the same end results" the Seventh Circuit specifically stated that since the Physical Structure of the Exhibit 21 did not have a progressively machined leading edge, it did not function like the patented blade.

removal knives or tools. There is no leading portion to form or indent a groove in the ice sheet preparatory to and preceding the engagement of the inclined surface with the ice sheet. Instead, there is a simple flat surface sweeping the ice downwardly. Since all portions of the ice-attacking inclined plane extend into the sheet of ice for substantially 95% of the ice thickness, the tool has no portion performing the groove-forming function of the claims of the Lees patent in suit. * * *

"The accused knives lack an essential element of each of the Lees patent claims. While the accused device and the patented blade both remove ice from a drum, beyond this point similarity ceases. * * *" (Appendix C, *infra*).

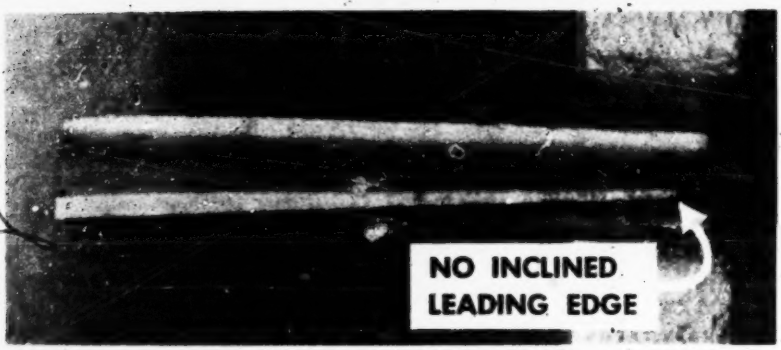
The petition for relief under Rule 60(b) established by clear photographs that respondent's Exhibit 21 was not the same blade used in respondent's ice machines. Indeed, none of the ice machines checked by the petitioners were using a blade similar to plaintiff's Exhibit 21.[1]

[1] In extensive search and investigation of North Star machines in Rochester, Syracuse, Niagara Falls, Long Island, Arkansas, Texas and Mississippi, it was discovered that no North Star machine examined had Ex. 21 type blades, and that all machines had the exact type of blade alleged before the Court as never having been used. [Record, Pet. for 60(b)]

The pictures set forth below and on the opposite page are from pages 10 and 11 of the Rule 60(b) Petition filed in the United States Court of Appeals. Other pictures are contained in the Petition for relief that further substantiate the fraud.

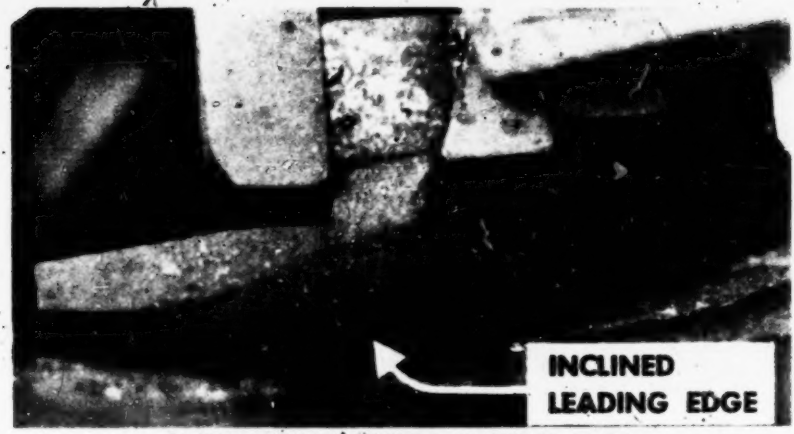
RESPONDENT'S FRAUDULENT EXHIBITS

PLAINTIFF'S EXHIBIT 21 BLADE
(NORTH STAR)

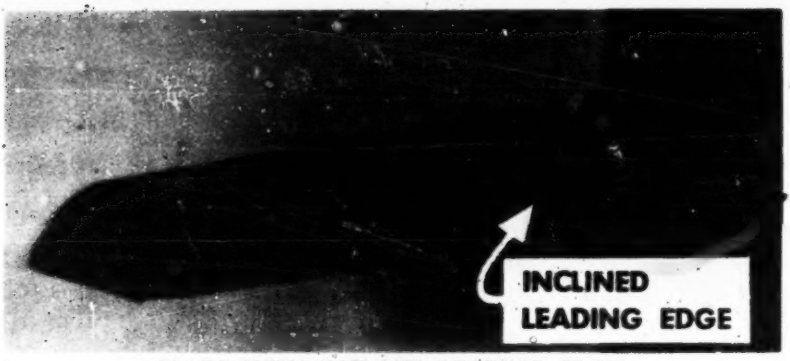


PLAINTIFF'S EXHIBIT 21 BLADE
(NORTH STAR)

RESPONDENT'S TRUE BLADES



BLADE WITH INCLINED LEADING EDGE
(NORTH STAR)



BLADE WITH INCLINED LEADING EDGE
(NORTH STAR)

The Petition for Relief further showed that the fraud even extended to the Service Manual introduced into evidence by Respondent. The Trial Service Manual, Exhibit 20, showed a drawing of a blade *without an inclined leading edge and identical to Exhibit 21.* All Service Manuals discovered as being used in the field disclosed a drawing of a blade *with the inclined leading edge.* (Record, Pet. for Relief)

Respondent's Fraudulent drawing of knife showing NO inclined leading edge. (Pet. for relief p. 24)

Respondent's True drawing of knife showing inclined leading edge. (Pet. for relief p. 25)

In short, the Petition for Relief established beyond any doubt a shocking and well planned fraud that has been perpetuated successfully by respondents in Federal Appellate Court. Indeed, in reading the Petition and the Motion for Rehearing one is impressed by the understatement of the fraud in view of the amazing documentary evidence.

The judgment of the Seventh Circuit Court now being attacked was entered on March 20, 1962. (Appendix C, *infra*) The Petition for Rehearing was denied on May 24, 1962. This Court denied certiorari on November 5, 1962, and the mandate of the Court of Appeals was filed in the district court on November 9, 1962. The Motion for Relief under Rule 60(b) because of fraud, etc., was filed in the United States Court of Appeals for the Seventl Circuit on May 17, 1963. The Court of Appeals on July 30, 1963, entered an order denying petitioner's request for relief under Rule 60(b). (Appendix A, *infra*). On August 28, 1963, petitioner tendered to the clerk of the Seventh Circuit a request for rehearing on the petition to vacate judgment under Rule 60(b). The court ordered the Petition for Rehearing filed as of November 5, 1963, and entered an order that same day explaining that the initial petition was not timely as having been filed more than one year after the date of the Circuit's opinion. The court then denied the request for rehearing. (Appendix B, *infra*) Petitioner seeks certiorari to review the order of the Seventh Circuit entered on July 30, 1963.

REASON FOR GRANTING THE WRIT

I. The proceeding below concerns the successful perpetuation of fraud upon a Federal Appellate Court (Seventh Circuit) that creates a manifest injustice warranting the exercise of this Court's supervisory powers.

Although the issues presented involving the interpretation of Federal Rule 60(b) constitute a valid ground for this Court to grant certiorari (discussed under heading II, *infra*), there is perhaps an even stronger reason why this Court should review the proceeding below. This nation acknowledges the rule of law as the foundation for its free democratic society. The vitality of this society requires, indeed demands, the fullest integrity of our judicial process. The 60(b) petition establishes that the respondent introduced into evidence a phony exhibit and a phony service manual. Even with the aid of such fraudulent exhibits the trial court held that the respondent infringed petitioner's patent and that the respondents had previously acted in conscious bad faith and had come into court with unclean hands (See Appendix D, *infra*). The respondent procurred a reversal of such decision in the Seventh Circuit solely because that Court relied on the respondent's false and fraudulent exhibits.

The subject matter of the previous case, patent infringement, is within the exclusive jurisdiction of the Federal Judicial System. Unfortunately, the momentary amounts

at stake in patent cases too often result in dishonest practice. See *e.g.* Joseph Borkin's *The Corrupt Judge*, page 14:

> "Next to bankruptcy, patent suits seemed most susceptible to the mendacity of judges. The burgeoning of the twentieth-century technology intensified the economic importance of the device of the patent. For control of this legal privilege, corporate giants often jockey for position and engage in business and legal warfare against each other. In these conflicts judges are frequently compelled to enter the realm of abstract mathematics, practical mechanics, and the intricacies of modern science. Called upon to adjudicate the philosophical riddle of where history ends and scientific creativeness begins, the venal judge is protected by the mercurial nature of the judgment and cannot be discovered or exposed from an examination of the decision or opinion alone. The study of precedents and principles of law avail the investigator little or nothing."

In the case at bar, of course, it is the Respondent who is responsible for the fraudulent exhibit not the judge.

The language in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, demonstrates the concern of this Court in seeking to eradicate corrupt and fraudulent practice within the federal judicial system.

> "But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. Mercoid Corp. v. Mid-Continent Invest. Co. decided January 3, 1944 (320 US 661, ante, 376, 64 S Ct 268); Morton Salt Co. v. G. S. Suppiger Co. 314 US 488, 86 L ed 363, 62 S Ct 402. Furthermore, tampering with the administration of

justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." 322 US at 246.

II. The proceeding below presents important questions regarding the application of Federal Rule 60(b) which have not been decided previously by this Court.

A. *A Petition for relief under Rule 60(b)(3) may be regarded as timely when filed within one year of the denial of rehearing and within six months of the issuance of the Court's mandate, even though more than one year has elapsed since the date of the Court's opinion.*

The majority of decisions construing the timeliness of Rule 60(b) (3) motions involve the district court. With reference to the appellate judgments, there is no known cases by this Court that decides whether the one year period runs from the date opinion or the date rehearing is denied. Petitioner submits there are several valid reasons for holding a petition filed within one year of the denial of rehearing is timely.

1. Rule 60(b) is remedial in scope and should be so construed. Congress in the 1946 Amendment enlarged the six month time limit to one year.

2. In other areas of federal practice, the time for perfecting appeals begins to run with the denial of a motion for rehearing.

3. As a practical matter, a lawyer who has filed a vigorous motion for rehearing will wait the court's reaction prior to invoking other judicial remedies.

Professor Moore in his treatise on Federal Practice notes:

> "**Effect of a motion under Rules 50(b), 52(b), 59(b), (d), and (e)** A timely motion under these Rules certainly destroys the finality of a judgment for purposes of appeal of any judgment that has been entered, and the full time for appeal commences to run anew from the entry of an order disposing of the motion except, of course, if a motion for a new trial under Rule 59(b) is granted or the court grants a new trial on its own initiative under Rule 59(d) there is no final judgment until a subsequent one is entered). * * * **Does the one year period of 60(b) continue to run from the original entry of the judgment or does it run anew from the entry of an order which disposes of the motion and restores the finality of the judgment? We are inclined to believe that the latter alternative should govern.** Until the District Court has disposed of the motion it has not lost control over its judgment, and there is no need to consider a motion under 60(b), which is the modern substitute for the pre-Rules remedies that afforded relief from final judgments over which the district court had lost control. (See, by analogy, the doctrine that a bill of review would not lie until the time for rehearing had expired * * * **If this be a "liberal" construction of 60(b)'s one year period, it is only in keeping with the general construction warranted.**" 7 Moore's Federal Practice ¶ 60.28 [2], p. 320, n. 36. (Emphasis added).

B. *The matter alleged in the Rule 60(b) constitute grounds for relief under Rule 60(b) (6) and also constitute grounds for relief for fraud upon the court.*

The ruling of the Seventh Court in holding the Petition for relief untimely is questionable on three grounds. The first, that the year period did begin to run until denial of rehearing has been discussed; the two other grounds involve whether the Petition stated a basis for relief under Rule 60(b) (6) or constituted a basis for relief because of fraud upon the court. The one year time limitation does not apply to motions under 60(b) (6) or for fraud upon the court.

This Court in *Klapprott v. United States*, 335 U.S. 601, has occasion to consider Rule 60(b) (6). And although the *Klapprott* decision is easily distinguishable from the case at bar, the opinion's rationale is still worthy of note:

> "Third, But even if this judgment of denaturalization is not treated as void, there remain other compelling reasons under amended 60(b) for relieving the petitioner of its effect. Amended 60(b) provided for setting aside a judgment for any one of five specific reasons or for "any other reason justifying relief from the operation of the judgment.": The first of the five specified reasons is 'mistake, inadvertence, surprise, or excusable neglect.' It is contended that the one-year limitation bars petitioner on the premise that the petition to set aside the judgment showed, at most, nothing but "excusable neglect." And of course, the one year limitation would control if no more than 'neglect' was disclosed by the petition. In that event the petitioner could not avail himself of the broad 'any other reason' clause of 60(b)." 335 U.S. at 613.

> "Under such circumstances petitioner's prayer for setting aside the default judgment should not be considered only under the excusable neglect, but also under the 'other reason' clause of 60(b), to which the one-year limitation provision does not apply." 335 U.S. at 614.
>
> "Furthermore 60(b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools. In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." 335 U.S. at 615.

With reference to the third ground, the power of the circuit court to provide remedies for fraud upon the court, this Court in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, a patent infringement suit, observed:

> "We have, then, a case in which undisputed evidence filed with the Circuit Court of Appeals in a bill or review proceeding reveals such fraud on that Court as demands, under settled equitable principles, the interposition of equity to devitalize the 1932 judgment despite the expiration of the term at which that judgment was finally entered. Did the Circuit Court have the power to set aside its own 1932 judgment and direct the District Court likewise to vacate the 1932 decree which it entered pursuant to the mandate based upon the Circuit Court's judgment? Counsel for Hartford contend not. They concede that the District Court has the power upon proper proof of fraud to set aside its 1932 decree in a bill of review proceding, but nevertheless deny that the Circuit Court possesses a similar power for the reason that the term during which its 1932 judgment was entered had expired. The question, then, is not whether relief can be granted, but which court can grant it.

"Equitable relief against fradulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archiac rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations. It was this flexibility which enabled courts to meet the problem raised when leave to file a bill of reveiw was sought in a court of original jurisdiction for the purpose of impeaching a judgment which had been acted upon by an appellate court. Such a judgment, it was said, was not subject to impeachment in such a proceeding because a trial court lacks the power to deviate from the mandate of an appellate court. The solution evolved by the courts is a procedure whereby permission to file this bill is sought in the appellate court. The hearing conducted by the appellate court on the petition, which may be filed many years after the entry of the challenged judgment, is not just a ceremonial gesture. The petition must contain the necessary averments, supported by affidavits or other acceptable evidence; and the appellate court may in the exercise of a proper discretion reject the petition, in which case a bill of review cannot be filed in the lower court." 322 U.S. at 247-248.

Petitioner submits that there is a substantial question whether the petition for relief asserts grounds within Rule 60(b)(6) and for fraud upon the court which warrants this Court to grant certiorari.

To facilitate a more decisive analysis of the Petition the following summary, augmenting the Statement, *supra*, is made.

The fact issues are easily descernable. Specific representations were made by respondent before the district and circuit courts. Physical and documentary evidence was presented and explained in unequivocable language by witnesses, and by respondent's counsel through the Briefs before the Seventh Circuit. Every statement, every piece of evidence, and every printed explanation by counsel represented Respondent's Exhibit 21 as "The only blades ever used—", by Respondent's ice machines. Respondent placed in evidence in the original trial the following:

1. One ice removal blade identified as the only blade ever used in any North Star Machines at any time (Exhibit 21). Questions to Mr. Allen J. Truer, President, Director, and Sales Manager of North Star since its inception in 1950:

> "Q. Can you identify among the exhibits that are in the Courtroom, *the blades* that have been *used* in the North Star machines from 1951 to date?
>
> "A. Yes, sir. The blades of Exhibit—
>
> "The Court: 21?
>
> "The Witness: 21.
>
> "Q. Have any of the North Star machines made in 1952, '53 or since ever contained any other type of blade?
>
> "A. No, sir." (Record, Pet. for 60b, p. 12).

2. A Service Manual with a drawing depicting exactly the same structure as Exhibit 21. The Service Manual was described as completely representative of all North Star

Machines. (Exhibit 20). Direct examination of Branchflower, Respondent's Principal.

"Q. I hand you Plaintiff's Exhibit 20 for indentification. Can you tell us what this is?

"A. Well, this is an icemaker manual for the North Star Icemakers.

"Q. Does it show the workings of your machines and instructions about working them?

"A. This covers, this particular manual has in it some sales material, at the back of the manual is an operator's manual.

"Q. As far as the mechanics of your machines are concerned, would the writings in this manual cover the mechanics of all the machines that you have made?

"A. It does. This describes for the operator how the machine functions, the care required for their proper operation, and how to service the machines, if, and as when they ever require service." (Record, Pet. 60(b), P. 24).

3. Two Drawings (Exhibits 25 & 26) illustrating the alleged "difference" between the North Star Blade and the Patented Blade.

"A. The Specific Illustrated "Difference" showed the North Star blade without an inclined leading edge, and the Patented Blade was illustarted with an inclined leading edge. (Motion for Rehearing of 60(b) Motion, p. 2). These Two drawing were included in Appendix P. 257-261, of Respondents Brief before the Seventh Circuit, and specifically called to the attention of the Seventh Circuit to induce it to accept these pictorial representations as fact to obtain a reversal of the District Court's Fact Findings.

Previous to the trial, North Star Attorney showed to Akshun Attorneys the same blade (Exhibit 21) and supplied

Akshun Attorneys with the same Service Manuals depicting a Blade without an inclined leading edge, and stressed that this was the only North Star Blade.

Letter from North Star Attorney to Akshun Attorney March 20, 1958 last paragraph:

> "When you were in my office I showed you a set of knives which are used in all of Branchflower's (North Star) machines and should be the same as the knives in the machine at Wilton. You will note on the enclosed print that the knife shown is of this form."
>
> (Record, Pet. for Rehearing, Petitioner's Supplemental Offer of Proof, Appendix C-5)

Affidavit of Marshall A. Burmeister, Pet. for Reh., Sup. Offer of Proof App. C-6, Paragraph 5-7:

> "In about March 1958, in Mr. James C. Wood's offices, Attorney for North Star, an ice removal blade identified as Plaintiff's Exhibit 21 was specifically shown to me by Mr. Wood. Mr. Wood represented that these blades typified those used in all Branchflower (North Star) machines.
>
> "Subsequent to the conference in Mr. Wood's office, I received a letter dated March 20, 1958, confirming the fact that the blades displayed to me were "used in all of Branchflower's (North Star) machines and should be the same as the knives (blades) in Wilton." (See Pet. Ex. 32)

Mr. Wood enclosed a drawing 2400 with his letter of March 20, 1958. (See Petitioner's Ex. 34.) This print (Pet. Ex. 34) depicts a Plaintiff's Exhibit 21 ice removal blade.

Burmeister Affidavit C-7 Paragraphs 3 & 4 (Record, Pet. for Reh., Sup. Off. of Proof).

> "Prior to the Trial of the North Star v. Akshun case, 57-C-1223, representatives of respondent submitted to

me a. North Star service manual including a drawing depicting a Plaintiff's Exhibit 21 blade (which manual was subsequently submitted into evidence by Akshun and identified as Defendant's Exhibit 6).

"Prior to and during the trial of the *North Star v. Akshun* case, 57-C-1223 it was my understanding that all of the North Star machines embodied Plaintiff's Exhibit 21 blades."

Thus, it can be seen that on every occasion prior to, during and after the trial, respondent represented that all blades were identical to Exhibit 21 which were ever used by North Star machines. This conclusive representation was the reason why both Petitioner's representatives and the Courts accepted as fact that Exhibit 21 was actually the North Star blade.

The opening statement before the Trial Court by North Star's Counsel was as follows:

"Our defense of non-infringement is simply one that no indenting portion at the front of it, no part to ever crack into the ice." (Record, Motion for Rehearing, p. 3)

Based upon the above evidence together with the full testimony of witnesses (Experts' Testimony offered only by Akshun), the Trial Judge (Hon. Julius Miner) found that the North Star blades "—exemplified by Plaintiff's Exhibit 21—" was an infringement of every claim of the Patent in suit.

Trial Court Finding No. 12, Appendix D, *infra:*

"The North Star ice removing tools exemplified by plaintiff's exhibit 21 do have the leading portion element of the knives called for in each claim of patent

2,659,212. The North Star ice maker ice removal knives infringe claims 1 & 2 of the Lees patent in suit; the method by which the North Star knives operate infringe method claims 3 and 4 of the patent in suit; and the North Star ice machines which incorporate the said infringing tools infringe combination claims 5, 6, 7, and 8 of the said patent in suit."

Trial Court Finding No. 15, Appendix D, *Infra.*

"The North Star blades were constructed in an attempt to depart as far from the physical features of the Lees blade as would be consistent with retaining the two-part function and method of the Lees blade. To the extent that the physical features of the North Star blade differ from the physical features of the Lees blade, any such differences are immaterial. The North Star blades, perform the same function in the same way to accomplish the same result as the patented blades—"

To induce the Seventh Circuit Court of Appeals to ignore these specific factual and functional findings the following statement was made by respondent's counsel in the original appeal:

Reply Brief p. 7

"The evidence to be examined is the tool, Exhibit 21, and the documents describing and specifying the environment and conditions of its use (Plaintiff's Appendix 257-261). The first sentence of finding 12 is clearly erroneous because the accused tool, Exhibit 21, does not have the leading portion element called for in each claim of Patent 2,659,212."

The Seventh Circuit in reversing an appeal went directly to the Exhibits and re-determined the *factual* and *functional identity* of the Exhibit 21 contrary to the Trial Court's

specific determination. In so doing the Appeals Court cited the specific alleged difference of the Exhibit 21 (no inclined progressive leading edge) as follows:

> "The evidence on the question of infringement is almost entirely documentary or in the form of physical exhibits. We have before us Plaintiff's Exhibit 21, a physical exhibit which illustrates the North Star Ice-removal knives or tools. There is no leading portion to form or indent a groove in the ice sheet preparatory to and preceeding the engagement of the inclined surface with the ice sheet. Since all portions of the ice-attacking inclined plane extend into the sheet of ice for substantially 95% of the ice thickness, the tool has no portion performing the groove-forming function of the claims of the Lees patent suit." (Appendix C, *infra*)

Petitioner's (Akshun Mfg. & V & S Ice Machine) (petition for relief under 60 lb) presented to the Seventh Circuit Proof that:

1. The Exhibit 21 was not in fact the tool used in North Star Machines.
2. That the Blades actually used in North Star Machines did in fact have inclined leading edges.

North Star, in its "answer" before the Seventh Circuit, seemingly admitted all the allegations of Petitioner concerning the Exhibit and thereby corroborated the basis of the petition to vacate the judgment.

Having been confronted with direct evidence beyond denial that respondent's physical exhibits, testimony, documents and arguments were fraudulent, the respondent has compounded the fraud before the Seventh Circuit on the

Rule 60(b) motion. One of the basic Documents used in the district court and particularly used before the Court of Appeals to obtain the Reversal was respondent's (North Star) Exhibit 20, a purported Service Manual which disclosed a drawing of an Exhibit 21 type blade. This document was returned to the Court of Appeals with the Drawing changed so that it now depicts a blade with an inclined progressive leading edge. On page 6 of Petitioner's Motion for Rehearing the matter of the altered Service Manual was dealt with clearly presented to the Seventh Circuit. Appendix C-5 through C-12 of the Petition for Rehearing establish that the Service Manual was altered since it was first introduced to the district court and since it was used in the Seventh Circuit to obtain the desired Reversal.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM VANDERCREEK,
3315 Daniels;
Dallas 5, Texas,
Attorney for Petitioners.

APPENDICES

APPENDIX A

North Star Ice Equipment Company, Plaintiff-Appellant v. Akshun Manufacturing Company, et al., Defendants-Appellees, United States Court of Appeals for the Seventh Circuit, No. 13443 Order dated July 30, 1963, denying Petition for Relief under Rule 60(b) A-1

APPENDIX B

North Star Ice Equipment Company, Plaintiff-Appellant v. Akshun Manufacturing Company, et al., Defendants-Appellees, United States Court of Appeals for the Seventh Circuit, No. 13443 Order of November 5, 1963, denying Petition for Rehearing and explaining basis of July 30 order B-1

APPENDIX C

North Star Ice Equipment Company v. Akshun Manufacturing Company, et al., 301 F. 2d 882 (7th Cir. 1962). Opinion of Court. C-1

APPENDIX D

North Star Ice Equipment Company v. Akshun Manufacturing Company, et al., Findings of Fact and Conclusions of Law in the United States District Court for the Northern District of Illinois D-1

APPENDIX A

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois, 60610

July 30, 1963

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Frederick O. Mercer, District Judge

No. 13443

NORTH STAR ICE EQUIPMENT COMPANY,
Plaintiff-Appellant,

v.

AKSHUN MANUFACTURING COMPANY, *et al.*,
Defendants-Appellees.

On March 20, 1962, this Court rendered a decision and judgment, affirming in part and reversing in part, the judgment of the District Court herein. We reversed that part of the District Court judgment which held that claims 1 through 8 of the patent in suit were infringed by North Star knives and tools. We also reversed the holding of the District Court that plaintiff came into Court with unclean hands.

Approximately fourteen months later, towit, on May 17, 1963, defendant Akshun Manufacturing Company filed with the Clerk of this Court, a petition to vacate our final judgment, or for leave to move before the District Court that

the judgment be vacated under Rule 60(b), or to remand to the District Court the issues raised by the petition. On June 10, 1963, plaintiff North Star Ice Equipment Company filed its answer to the petition, denying the pertinent allegations of the petition.

On June 13, 1963, Akshun Manufacturing Company filed what it designated as an "Emergency Motion", asking leave to file an answer to North Star's answer.

The Court being fully advised of the issues raised by the petition of Akshun Manufacturing Company, and the answer thereto filed by North Star Ice Equipment Company

IT IS ORDERED, the petition of Akshun Manufacturing Company for leave to file an answer to the answer filed by North Star Ice Equipment Company be and the same is hereby denied.

IT IS FURTHER ORDERED, that the petition filed by Akshun Manufacturing Company, that our judgment herein dated March 20, 1962 be vacated, and for alternative relief, be and the same is hereby denied.

APPENDIX B

United States Court of Appeals
For the Seventh Circuit

Chicago 10, Illinois
November 5, 1963

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Frederick O. Mercer, District Judge

No. 13443

NORTH STAR ICE EQUIPMENT COMPANY,
Plaintiff-Appellant,

v.

AKSHUN MANUFACTURING COMPANY, *et al.*,
Defendants-Appellees.

On March 20, 1962, this Court entered judgment in this case affirming in part and reversing in part the judgment of the District Court herein. We reversed that part of the District Court judgment which held that Claims 1 through 8 of the patent in suit were infringed by North Star knives and tools. We also reversed the holding of the District Court that the plaintiff came into court with unclean hands.

On May 17, 1963, defendant Akshun Manufacturing Company filed with this Court a petition under Rule 60(b) asking that the judgment of the Court dated March 20, 1962, be vacated or, in the alternative, for leave to move before the District Court that the judgment be vacated under Rule 60(b), or to remand to the District Court the issues raised by said petition.

North Star Ice Equipment Company, the plaintiff herein, filed a 26-page answer to Akshun's motion. Attached to said answer were ten affidavits containing some fifty pages. One of the sections of said answer was labeled "Unconscionable Conduct of Akshun's Officers."

Akshun's petition to vacate judgment pursuant to Rule 60(b) was based principally upon a charge of fraud on the part of plaintiff North Star and on newly discovered evidence.

On the date of the filing of the Akshun petition to vacate judgment, Rule 60(b), Federal Rules of Civil Procedure, provided in part: "On motion . . . the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . misrepresentation, or other misconduct of an adverse party; . . . The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken . . ."

The petition of Akshun was not timely as it was filed more than one year after the date of the judgment of this Court.

On June 13, 1963, Akshun Manufacturing Company filed what it designated as an "Emergency Motion" asking leave to file an answer to North Star's answer. On July 30, 1963, this Court entered an order denying the petition of Akshun Manufacturing Company for leave to file an answer to the answer, and it further denied the petition filed by Akshun Manufacturing Company that our judgment dated March 20, 1962 be vacated and for alternative relief.

On August 28, 1963, there was tendered to the Clerk of this Court a request by Akshun Manufacturing Company and V & S Ice Machine Company, Inc. for a rehearing on the petition to vacate judgment under Rule 60(b).

The Court being fully advised,

IT IS ORDERED, that the request for a rehearing on the petition to vacate judgment may be filed in this Court, and .

IT IS FURTHER ORDERED, that said request for a rehearing on petition to vacate judgment be and the same is hereby DENIED.

APPENDIX C

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

301 F. 2d 882

[Heading Omitted]

March 20, 1962

Before DUFFY and CASTLE, *Circuit Judges*, and MERCER, *District Judge*.

DUFFY, *Circuit Judge*. This suit is a declaratory judgment action asking the Court to declare United States Patent No. 2,659,212 invalid and not infringed by North Star's ice-removal tool, method of removing ice and ice-machine combination, and that Patent No. 2,683,357 is invalid and not infringed by North Star's ice-machine overflow trough. These patents are owned by defendant Akshun Manufacturing Company (Akshun). Kent Industries, Inc. (Kent) manufactured and sold ice machines and was a licensee under the two Akshun patents mentioned.

On September 8, 1950, Gerald Lees filed a patent application in the United States Patent Office which he assigned to Akshun. The patent issued on November 17, 1953 as Patent No. 2,659,212, and is the principal patent in suit.

The District Court held Patent No. 2,683,357 invalid, but if valid, not infringed. It held Patent No. 2,659,212 valid and infringed. Plaintiff's prayer for an injunction against alleged unfair trade practices was denied. The judgment order was silent as to Patent No. 2,683,357. The judgment permanently enjoined plaintiff from infringing Patent No. 2,659,212.

North Star Ice Equipment Company (North Star) was incorporated in 1950 in the State of Washington, and had its principal office and manufacturing facilities in the City of Seattle. North Star made and sold ice-making machines which produced flaked ice used in cooling fish and poultry.

The North Star machine utilized a cylindrical drum which opened downwardly into an ice storage space or room. The drum is refrigerated so that water poured down over its inner surface freezes on that surface into a sheet of ice. Slowly revolving blades or knives remove the ice from the cylinder in coin-sized flakes which fall into the ice storage room. It is the knives or blades in this machine that are the basis of the controversy in this suit.

Prior to 1950, Treuer, the President of North Star, and Lyle Branchflower were in the business of extracting vitamin-bearing oils from the livers of fish. The fish livers were obtained from the fishing fleet based in Puget Sound, and flaked ice was used in large quantities by the fishing boats to preserve the fish on the journey back to port. In 1945, North Star installed an ice-making plant which serviced the fishing fleet, but insufficient flaked ice was produced to fulfil the demand.

Gerald Lees had been working in refrigeration and building ice-making machines since 1944. In 1949, Branchflower entered into a written agreement with Lees whereby the latter was to design and supervise the construction of a ten-ton ice-maker. Lees was to receive $1,000 for his services. Such machine was constructed during the summer of 1949 but was not successful. Ice clogged between adjacent ice-removal knives. Only a part of the ice sheet on the drum was removed. The machine was torn down and abandoned. However, Lees received $1,000 pursuant to the agreement.

Treuer, Branchflower and their associates then built an ice machine of their own design. Plaintiff claims this machine utilized unique ice-removal knives. The machine, completed in 1950, proved successful. Several similar machines were built in the latter part of 1950 and were in successful operation at the time the trial herein was held.

During 1950, James Albright, later President of Akshun, attempted to make some arrangement with Branchflower and Treuer for the use of their ice machine, but the negotiations were dropped. In the summer of 1950, Albright arranged for Lees to come to Chicago for the purpose of

setting up ice-manufacturing facilities. Albright arranged for Lees to file a patent application on two-part ice-removal blades similar to those used in the machine which he had designed in 1949. Lees left Akshun in the latter part of 1951. Litigation arose between Lees and Akshun over the ownership of the patent applications which had been filed by Lees. The matter was before this Court in *Lees vs. Akshun Manufacturing Company, et al.*, 7 Cir., 205 F.2d 577.

On February 14, 1957, Akshun filed suit in the Western District of Wisconsin against Tillman Produce Company charging infringement of Patent No. 2,659,212 and Patent No. 2,683,357 because of Tillman's use of an ice-making machine manufactured by North Star. This case was dismissed on September 28, 1959, upon a stipulation of the parties.

The application for Patent No. 2,659,212 named Gerald L. Lees as inventor. The application disclosed and claimed a particular knife for removing a thin sheet of ice in flakes from the freezing surface on the inside of an upright drum-type ice-making machine. The knives are carried on an arm revolving slowly around the freezing surface. Each knife has a horizontal leading portion with an edge adapted to score and form a groove in the ice. A plurality of knives, one above the other, is present to score the ice into a plurality of parallel-spaced grooves. Each knife also has a trailing portion riding in the groove previously formed by the leading portion. The trailing portion is tilted downwardly at an angle to the direction of movement to force the scored ice downwardly, breaking the bond between the ice and the freezing surface, and thus completing the ice-removal process.

The file wrapper of the Lees Patent No. 2,659,212 shows the application as first filed contained eleven claims. Claims 1, 2 and 3 claimed ice-removal knives, describing the leading portion with its scoring or groove-forming function, and the trailing portion with its angle to direction of movement to force the ice downward.

On July 19, 1951, Lees added Claim 13. This claim was broader than the original claims in that it omitted the leading part of the blade and its scoring or groove-forming function. On December 17, 1951, the Patent Office rejected all then pending claims as unpatentable over prior art patent, Taylor 2,063,770. The applicant replaced all prior claims with eight replacement claims; 14 and 15 claimed the two-part knife; 16 and 17 claimed the two-part method of removing ice. The applicant emphasized that the gist of the claimed invention was a knife having two distinct parts and functions, in which the leading part scores the ice to form a groove after which the trailing part rides in the groove and forces the ice downwardly.

On February 11, 1953, new Claims 14, 15, 16 and 17 were rejected as unpatentable over the Taylor patent disclosure, and combination Claims 18, 19, 20 and 21 were allowed.

On May 13, 1953, Claims 14 and 15 were amended to define the "substantially straight scoring edge" as "of substantial extent," and to describe the tilted shearing edge as "positioned at its forward part to ride in the groove" left by the scoring edge. Method Claims 16 and 17 were amended to limit their scoring function to forming grooves "throughout the extent of the freezing surface."

Patent No. 2,659,212 issued on November 17, 1953 with Claims 14 through 21 as amended becoming Claims 1 through 8 of the patent. All claims in the patent have as a limitation a knife having the two distinct parts serving their separate functions.

We think the District Court was correct in holding that Holden Reissue Patent No. 13,000 did not anticipate. In Holden, vertical cutters chip ice off the inside wall and the chipped ice floats to the top. In Lees' patent in suit, substantially horizontal knives score and wedge ice off the inside wall of the drum and the dry flaked ice falls down and out of the drum.

The Patent Office issued the patent in suit after a full consideration of the other prior art patents principally relied on by plaintiff. A presumption of validity attaches to the grant of a patent. We think the claimed invention was something beyond what was obvious to persons skilled in the art to which it relates. We sustain the findings and conclusions of the trial court that Claims 1 through 8 of the Lees Patent No. 2,659,212 are valid.

The evidence on the question of infringement is almost entirely documentary or in the form of physical exhibits. We have before us plaintiff's Exhibit 21, a physical exhibit which illustrates the North Star ice-removal knives or tools. There is no leading portion to form or indent a groove in the ice sheet preparatory to and preceding the engagement of the inclined surface with the ice sheet. Instead, there is a simple flat surface sweeping the ice downwardly. Since all portions of the ice-attacking inclined plane extend into the sheet of ice for substantially 95% of the ice thickness, the tool has no portion performing the groove-forming function of the claims of the Lees patent in suit.

Claim 1 of the patent in suit is typical of Claims 1, 2 and 5 through 8 in its definition of the two parts of the knife of the patent in suit. The pertinent parts of Claim 1 are:

"A knife to remove ice . . .

First part { 'having a substantially straight scoring edge of substantial extent adapted to indent the ice to form a groove as it travels thereover,'

Second part { 'and a shearing edge tilted in relation to the scoring edge and positioned at its forward part to ride in the groove to apply pressure transverse to the direction of indentation to shear the bond between the ice and the surface to which it is frozen.' "

Claim 3 is typical of Claims 3 and 4 of the patent in suit. Claim 3 states:

"The method of removing ice . . .

First part { 'compromising the steps of scoring the ice along its exposed surface in a continuous straight line motion throughout the extent of the freezing surface'

Second part { 'and then forcing the ice in direction transverse to the direction of score to shear the bond between the ice and the surface to which it is frozen.'"

It is the "first part" recited in each part of the claims of the patent in suit that is completely missing from the North Star tools.

The accused knives lack an essential element of each of the Lees patent claims. While the accused device and the patented blade both remove ice from a drum, beyond this point the similarity ceases. The mere fact that the same end result is accomplished, is not sufficient to be the basis of a finding of infringement. There is no real identity in the structure and they do not function the same. As we stated in *Independent Pneumatic Tool Co.* v. *Chicago Pneumatic Tool Co.*, 7 Circ., 194 F. 2d 945, 947, mere application of claim phraseology is not alone sufficient to establish infringement, nor is the similarity of result. We stated there must be real identity of means, operation and result.

The function of removing ice with a cutter or blade was old before the patent in suit. What was patented is the particular means described for performing the ice-removing function. There cannot be infringement without substantial identity. In the instant case, the North Star tool completely lacks both the element of the leading, scoring, groove-forming edge and also its groove-forming function. Under such circumstances, we hold that the North Star knives did not infringe Claims 1 through 8 of Lees patent in suit.

Had Claim 13 been allowed, it might well have covered the one part accused North Star blade, but since it was rejected

and cancelled by the applicant, the assignee of applicant is estopped to broaden by interpretation, the claims of its patent to embrace that which was given up in the Patent Office.

Pertinent also is the statement in *Weber Electric Co.* v. *E. H. Freeman Electric Co.*, 256 U.S. 668, at pages 677-678, "Having thus narrowed his claim against rotary movement in order to obtain a patent, the patentee may not by construction, or by resort to the doctrine of equivalents, give to the claim the larger scope which it might have had without the amendments, which amount to a disclaimer of rotation as an operative feature of his device."

That part of the judgment of the District Court which held the claims of the patent in suit, No. 2,659,212, to be valid, will be affirmed; also, that part of the judgment dismissing plaintiff's claim for damages by reason of threats of suit by defendant, will be affirmed; that part of the judgment holding Patent No. 2,683,357 to be invalid, will likewise be affirmed; that part of the judgment that the counterclaim of defendant, Kent Industries, Inc., for an injunction and damages by reason of threats of suit by plaintiff, be denied and dismissed, is likewise affirmed. That part of the judgment of the District Court which held that Claims 1 through 8 of the patent in suit were infringed by North Star knives and tools, will be reversed; likewise reversed is the holding of the District Court that plaintiff came into court with unclean hands.

Plaintiff will pay the costs in this Court except that one-half (½) of the costs of printing appellant's appendix shall be paid by Akshun Manufacturing Company, defendant-appellee.

AFFIRMED in part;
REVERSED in part.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT ORDER

[Heading Omitted]

Tuesday, March 20, 1962

Before

Hon. F. RYAN DUFFY, Circuit Judge
Hon. LATHAN CASTLE, Circuit Judge
Hon. FREDERICK O. MERCER, District Judge

NORTH STAR ICE EQUIPMENT COMPANY Plaintiff-Appellant, No. 13443 VS. AKSHUN MANUFACTURING COMPANY, a corporation, and KENT INDUSTRIES, INC., a corporation, Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on the be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that that part of the judgment of the District Court which held the claims of the patent in suit, No. 2,659,212, to be valid be affirmed; also, that part of the judgment dismissing plaintiff's claim for damages by reason of threats of suit by defendant, be affirmed; that part of the judgment holding Patent No. 2,683,357 to be invalid, likewise is affirmed; that part of the judgment that the counterclaim of defendant, Kent Industries, Inc., for an injunction and damages by reason of threats of suit by plaintiff, be denied and dismissed, is likewise affirmed. That part of the judgment of the District Court which held that claims 1 through 8 of the patent in suit were infringed by North Star knives and tools, is reversed; likewise reversed is the holding of the District Court that plaintiff came into court

with unclean hands, in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged that Plaintiff pay the costs in this Court except that one-half (½) of the costs of printing appellant's appendix shall be paid by Akshun Manufacturing Company, defendant appellee.

ORDER DENYING PETITION FOR REHEARING

[Heading Omitted]

Thursday, May 24, 1962

Before

Hon. F. RYAN DUFFY, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge
Hon. FREDERICK O. MERCER, District Judge

NORTH STAR ICE EQUIPMENT COMPANY,
Plaintiff-Appellant,
VS.
No. 13443
AKSHUN MANUFACTURING COMPANY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

[Heading Omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having been fully tried before the Court, and the Court having read the pleadings filed herein by the respective parties, and the Court having heard and examined all the testimony, documents and exhibits presented by the respective parties and admitted into evidence, and the Court having read, heard and considered the briefs, memoranda and oral arguments submitted by counsel in support of their respective positions, and the Court being fully advised, the Court hereby enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

I. THE PARTIES, THE PLEADINGS, AND PRELIMINARY MATTERS

1. North Star Ice Equipment Company is a Washington corporation with its principal place of business in Seattle, Washington, and is engaged in the manufacture and sale of North Star Ice Makers for the production of ice in flake form.

2. Defendant, Akshun Manufacturing Company, is an Illinois corporation with an office in Chicago, Illinois, and is a patent holding company. Co-defendant, Kent Industries, Inc., is an Illinois corporation now involved in a proceeding in this Court under Chapter 11 of the Federal Bankruptcy Law and is a licensee of Akshun Manufacturing Company under its patents here in suit.

3. This suit was instituted by North Star for a declaratory judgment that Akshun's patent 2,659,212 is invalid and not infringed by North Star's ice removal tool, method

of removing ice and ice machine combination, and that Akshun's patent 2,683,357 is invalid and not infringed by North Star's ice machine overflow trough. Plaintiff further seeks to restrain defendants from suing, threatening to sue, or sending threats of suits or notices to plaintiff and customers or prospective customers of plaintiff charging infringement of the said patents. Finally, plaintiff requests damages allegedly sustained by reason of the said threats of suit.

4. Defendant Kent filed a counterclaim seeking to restrain plaintiff North Star from threatening purchasers and prospective purchasers of this defendant's machines with suit for infringement of plaintiff's patent 2,735,275, and for damages. On the first day of trial, the court granted this defendant leave to amend its prayer for injunction to refer to the specific number of this patent.

5. Akshun Manufacturing Company on February 14, 1957, filed suit in the Northern District of Wisconsin against Tillman Produce Company, Civil Action 2918, charging infringement of patents 2,659,212 and 2,683,357 by Tillman's use of an ice making machine manufactured by North Star Ice Equipment Company.

6. A bona fide controversy exists between the parties.

II. LEES PATENT 2,659,212 IN SUIT

A. *The Scope and Limitations of the Patent.*

7. On September 8, 1950, application for patent 2,659,212, naming Gerald M. Lees as inventor, was filed in the Patent Office. The application disclosed and claimed a particular knife for removing a thin sheet of ice in flakes from the freezing surface on the inside of an upright drum-type ice making machine. The knives are carried on an arm revolving slowly around the freezing surface. Each knife has a horizontal leading portion with an edge adapted to score and form a groove in the ice. A plurality of knives, one above the other, are present to score the ice into a plurality of parallel spaced grooves. Each knife also has a trailing

portion riding in the groove previously formed by the leading portion. The trailing portion is tilted downwardly at an angle to the direction of movement to force the scored ice downwardly, breaking the bond between the ice and the freezing surface and thus completing the ice removal process.

8. The file wrapper of the Lees patent shows that the application filed in the Patent Office on September 8, 1950, contained eleven claims. Claims 1, 2 and 3 claimed ice removal knives, describing the leading portion with its scoring or groove-forming function and the trailing portion with its angle to direction of movement to force the ice downward. Claims 4 and 5 of the original application were directed to the method of removing ice from a surface to which it is frozen by initially scoring the ice followed by the forcing of the ice downward by pressure applied to the ice along the score lines or grooves. Claims 6, 7 and 8 were directed to combinations of elements constituting flake ice making machines, including ice removal blades. Claims 9, 10 and 11 claimed mechanisms for scoring and flexing ice.

8. On July 19, 1951, as shown by the file wrapper, Lees added a new claim 13 to his application for patent 2,659,212. Claim 13 was broader than the original claims in that it omitted the leading part of the blade and its scoring or groove-forming function. Claim 13 claimed only the trailing part of the knife which is at an angle to the direction of movement of the knives, and would, had it been allowed, read on wedge-type one-part ice removal tools.

9. On December 17, 1951, the Patent Office rejected all then pending claims as unpatentable over prior art patent, Taylor 2,063,770. The applicant thereafter replaced all prior claims with eight replacement claims (14 and 15 claimed the two-part knife; 16 and 17 claimed the two-part method of removing ice; 18 through 21 claimed the machine for making ice and its removal by use of the claimed knife). The applicant also stressed to the Patent Office that the gist of the claimed invention was a knife having two dis-

tinct parts and functions, in which the leading part scores the ice to form a groove after which the trailing part rides in the groove and forces the ice downwardly.

10. On February 11, 1953, new claims 14, 15, 16 and 17 were rejected as unpatentable over the Taylor patent disclosure, and combination claims 18, 19, 20 and 21 were allowed. The combination claims describe the machines for making flake ice in general terms, but describe the blades which are part of the respective combinations with particularity, stating again their two-part description and function.

11. On May 13, 1953, claims 14 and 15 were amended to define the "substantially straight scoring edge" as "of substantial extent," and to describe the tilted shearing edge as "positioned at its forward part to ride in the groove" left by the scoring edge. At that time, too, method claims 16 and 17 were amended to limit their scoring function to forming grooves "throughout the extent of the freezing surface." The patent issued on November 17, 1953, with claims 14 through 21, as amended, becoming claims 1 through 8 of the patent. All claims in the patent have as a limitation a knife having the two physically distinct parts serving their separate functions.

B. *The Infringement Issue*

12. The North Star ice removing tools exemplified by plaintiff's exhibit 21 do have the leading portion element of the knives called for in each claim of patent 2,659,212. The North Star ice maker ice removal knives infringe claims 1 and 2 of the Lees patent in suit; the method by which the North Star knives operate infringe method claims 3 and 4 of the said patent in suit; and the North Star ice machines which incorporate the said infringing tools infringe combination claims 5, 6, 7 and 8 of the said patent in suit.

13. The blades used in North Star ise makers were constructed in a deliberate attempt to appropriate the improve-

ments developed by Lees during the period when Lees was engaged by contract to build a working ice machine for North Star's predecessor, the Lyle Branchflower Company. That contractual arrangement did not contemplate the alienation by Lees of any improvements developed by him for any but the single ice machine which he was engaged to construct for use by Branchflower.

14. The evidence clearly shows that Branchflower intended to produce and sell ice machines in quantity at the time Lees was engaged to construct a machine. It was not until after the machine was constructed that Branchflower disclosed its intention to manufacture and market the machine as its own creation. Upon termination of Lees' said engagement, the Branchflower organization launched its ice making machine business.

15. The North Star blades were constructed in an attempt to depart as far from the physical features of the Lees blade as would be consistent with retaining the two-part function and method of the Lees blade. To the extent that the physical features of the North Star blade differ from the physical features of the Lees blade, any such differences are immaterial. The North Star blades perform the same function in the same way to accomplish the same result as the patented blades. The North Star blades, being the equivalent of the patented blades, infringe claims 1 and 2 of patent 2,659,212; and the North Star ice machines which incorporate the said equivalent infringing blades, being themselves the equivalent of the patented combinations, infringe claims 5, 6, 7 and 8 of patent 2,659,212.

C. *The Validity Issue*

16. Lessard and Lees patent 2,585,020 (the same Gerald M. Lees aforesaid), prior art cited by plaintiff against the Lees patent in suit, was issued February 12, 1952, on an application filed July 26, 1948. The patent, in fifteen combination claims, describes an upright drum type of ice making machine with a plurality of revolving knives for removing the ice in flakes from the outside circumference of the drum. The knives are more particularly described as:

"knife-edged wedges [which] crack the sheet of ice * * *, the knife edges of said wedges lying tangent to the drum surface and parallel one to another in planes defining right sections of the drum" (claim 1); "wedging knives" (claims 4, 5); "wedging knives [having] their wedge faces each sloped in a corresponding direction from the horizontal" (claim 6); "the knife being so formed and disposed that both wedging faces slope downwardly from [the] functioning edge" (claims 7, 8); "wedging means" (claims 10, 11). The Lessard and Lees patent was referred to of record by the examiner in the prosecution of the application which resulted in patent 2,659,212, but was not applied to disallow any claim therein sought. The Lessard and Lees patent disclosure does not anticipate or render invalid any of the claims of the Lees patent in suit. No claim in Lessard and Lees refers to or is equivalent with a two-part knife or a two-part method of removing ice.

17. Holden patent Reissue 13,000, prior art cited by plaintiff against the Lees patent in suit, was issued July 27, 1909, on an application filed March 25, 1909. This Holden patent was not cited by the Patent Office as a reference in the prosecution of the application which resulted in patent 2,659,212. It was introduced into evidence in this case without any expert or other testimony analyzing it or comparing it with the Lees patent in suit. Claims 17, 18, 21 and 22 of the said Holden patent read as follows:

> "17. In an ice machine, the combination of a vertical freezing cylinder, a vertical rotating shaft in the cylinder, and a series of cutters suspended from the shaft to different levels within the cylinder.
>
> "18. In an ice machine, the combination of a vertical freezing cylinder, a vertical rotating shaft in the cylinder, and a series of cutters suspended from the shaft in successive steps of elevation.
>
> "21. In an ice machine, the combination of a vertical tank, a rotating shaft in the tank, a series of lever-arms pivoted to the shaft, a series of depending bars or arms pivoted to the lever-arms, each depending

bar or arm carrying a series of cutters, the cutters of the several series being arranged in successive steps of elevation.

"22. In an ice machine, the combination of a vertical tank, a rotating shaft in the tank, a series of lever-arms pivoted to the shaft, a depending bar or arm pivoted to each lever-arm, the depending bars or arms being of different lengths, and cutters at intervals carried by the depending bars or arms."

Except for the specification of the claimed two-part ice removal knives in combination claims 5 through 8 of the Lees patent in suit, one or more of the above claims 17, 18, 21 and 22 of the Holden patent Reissue 13,000 would anticipate and render invalid the said combination claims of the Lees patent in suit. Because of the specification of the two-part ice removal knives in combination claims 5 through 8 of the Lees patent in suit, none of the said claims 17, 18, 21 and 22 of the Holden patent anticipate or render invalid the said combination claims of the Lees patent in suit.

18. No claims of the Lees patent 2,659,212 in suit are anticipated or rendered invalid by the disclosures in Taylor patent 2,063,770, and Raver patent 2,308,541, less pertinent prior art cited by plaintiff against the said Lees patent.

III. ALBRIGHT PATENT 2,683,357 IN SUIT

19. Albright patent 2,683,357, filed October 26, 1951, issued July 13, 1954. The application disclosed an upright drum type of ice making machine and the patent, in claims 1, 2 and 3, claims a trough structure for catching an excess of water poured over the refrigerated drum surface to make ice. The particular structure claimed is a trough placed below the lower edge of the drum surface, and mounted on a rotor that carries the revolving ice removing knives. Another circular trough below the revolving trough is positioned to receive the water through a drain in the bottom of the revolving trough. Each of the 5 claims of Albright

patent 2,683,357 requires a structure in which the revolving trough below the lower edge of the drum is present. Claims 4 and 5 define the trough as part of certain flake ice making machines.

20. North Star ice makers have not and do not contain a revolving trough of any kind. There is no infringement of any claim of Albright patent 2,683,357.

21. Prior art Lessard and Lees patent 2,585,021 was filed November 27, 1948 and issued February 12, 1952. The patent describes an upright drum type of ice making machine in which water in excess flows over the freezing surface of the drum and is caught in a revolving trough 30 which empties into a circular basin 31. The arrangement, structure and operation of the trough mechanism shown in prior patent 2,585,021 is substantially the same as claimed in claims 1, 2 and 3 and described in combination claims 4 and 5 of the later Albright patent 2,683,357 in suit. The disclosures of the earlier patent 2,585,021 anticipate and render patent 2,683,357 in suit invalid.

IV. BRANCHFLOWER PATENT 2,735,275

22. The validity of patent 2,735,275 is not before the court because there is no evidence that it is owned by any party to this suit or any party summoned before this court to defend the said patent, and because the pleadings do not place the validity of the patent in issue. The counterclaim of Kent Industries Inc. alleges that patent 2,735,275 is owned by North Star Ice Equipment Co., which allegation is denied. No evidence has been presented to support that allegation.

V. THE UNFAIR COMPETITION ISSUES

23. No evidence was offered concerning the counterclaim of Kent Industries Inc. for injunction and damages for customer threats alleged to have been made by plaintiff. The counterclaim, being thus unsupported on the record, must be dismissed on its merits.

24. In view of the findings by the court concerning plaintiff's infringement of Lees patent 2,659,212, the court finds that defendants' charges of infringement directed to plaintiff and plaintiff's customers were not unwarranted. There is insufficient evidence to permit a finding that the defendants' charges of infringement and threats of suit went beyond the bounds of propriety.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties to and the subject matter of this suit.

2. Claims 1 through 8, inclusive, of patent 2,659,212, in suit, are valid.

3. Claims 1 through 8, inclusive, of patent 2,659,212, in suit, have been infringed by plaintiff.

4. Claims 1 through 5, inclusive, of patent 2,683,357, in suit, are invalid for lack of invention in view of the prior art.

5. Claims 1 through 5, inclusive, of patent 2,683,357, in suit, if valid, have not been infringed by plaintiff.

6. The court has no jurisdiction over Lyle Branchflower or patent 2,735,275.

7. Plaintiff's claim for damages by reason of threats of suit by defendants must be denied and dismissed on its merits.

8. The counterclaim of defendant Kent Industries, Inc., for an injunction and damages by reason of threats of suit by plaintiff must be denied and dismissed on its merits.

9. Defendants are entitled to permanent injunction restraining plaintiff from infringement of patent 2,659,212.

10. Defendants are entitled to a judgment for damages from plaintiff for infringement of patent 2,659,212.

11. Plaintiff, having deliberately and fraudulently appropriated the improvements later disclosed by the inventor in patent 2,659,212, and having thereafter sought herein to

invoke the equitable power of this court on its behalf to restrain defendants from asserting rights in the said patent and in patent 2,683,357, has come into court with unclean hands. As to the equitable relief sought, the doctrine of unclean hands must be and hereby is invoked. Accordingly, all equitable relief should be denied.

/s/ JULIUS H. MINER
Judge

Dated: March 31, 1961

JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

[Heading Omitted]

This cause having come on for entry of judgment on the liability and equitable issues in the case, the court having rendered its Findings of Fact and Conclusions of Law, the court enters its judgment as follows:

1. The court has jurisdiction of the parties to and the subject matter of this suit.

2. Plaintiff is hereby permanently enjoined and restrained from infringing patent 2,659,212.

3. Plaintiff's claim for damages by reason of threats of suit by defendant is denied and dismissed on its merits.

4. The counterclaim of defendant Kent Industries, Inc., for an injunction and damages by reason of threats of suit by plaintiff is denied and dismissed on its merits.

5. The court has no jurisdiction over Lyle Branchflower or patent 2,735,275.

6. To the extent that plaintiff seeks equitable relief, plaintiff's suit is dismissed for want of equity.

7. Plaintiff is liable to defendants for damages for infringement of patent 2,659,212.

8. Proceedings for assessment of the said damages are hereby continued generally pending a motion by either party upon notice to the other.

/s/ JULIUS H. MINER
Judge

Dated: APR 25 1961

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 805

AKSHUN MANUFACTURING COMPANY, ET AL.,
Petitioners,

vs.

NORTH STAR ICE EQUIPMENT COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN REX ALLEN,
JAMES C. WOOD,
LLOYD W. MASON,
20 North Wacker Drive,
Chicago 6, Illinois,
Counsel for Respondent.

HOFGREN, BRADY, WEGNER,
ALLEN & STELLMAN,
20 North Wacker Drive,
Chicago 6, Illinois,
Attorneys for Respondent.

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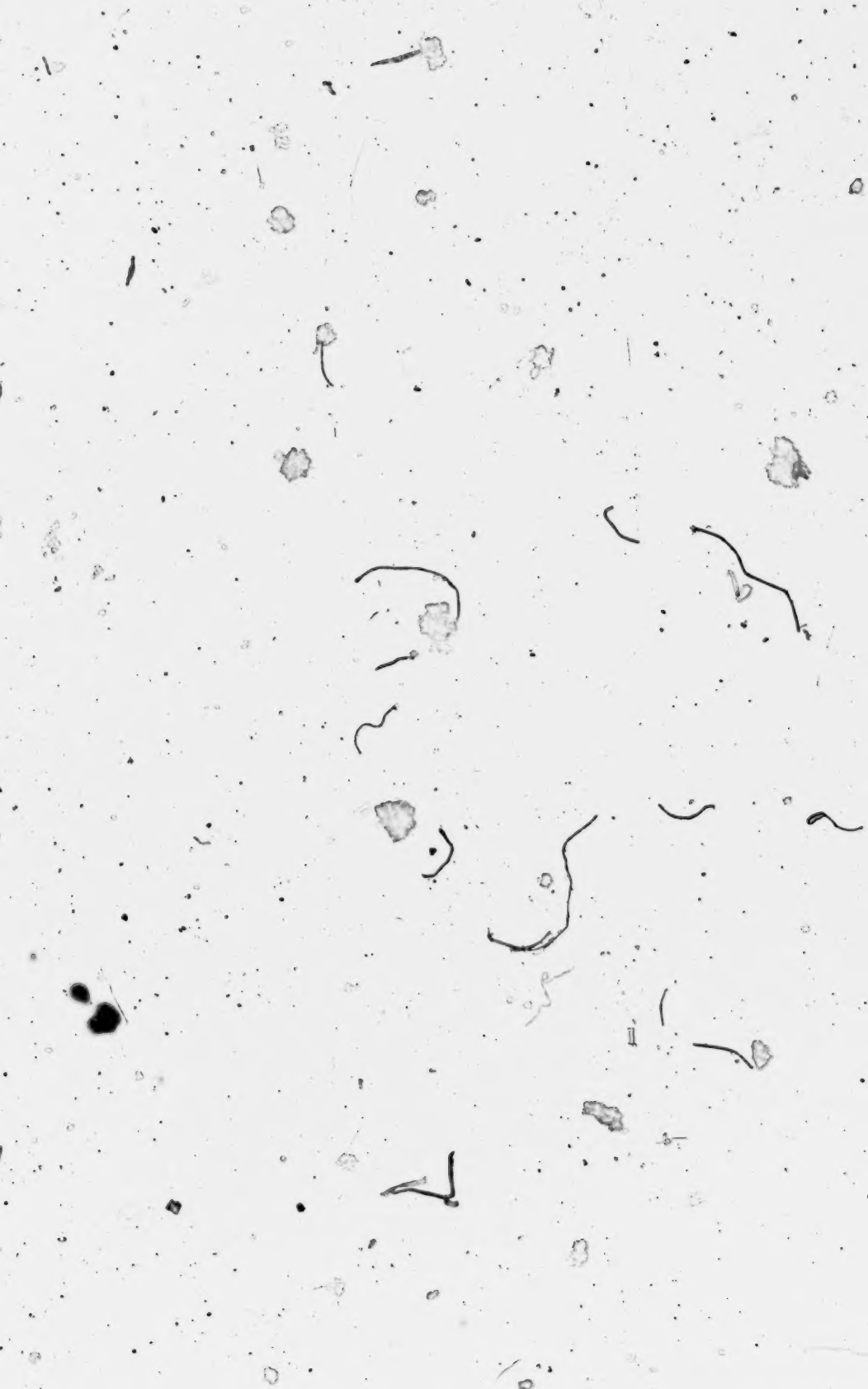

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

JURISDICTION.

The jurisdictional requisites are adequately presented in the Petition.

QUESTIONS PRESENTED.

The Petition for a Writ of Certiorari raises the same issues that were presented to the Court of Appeals by the Petition under Rule 60(b). (Record, Petition under Rule 60(b), page 5.) The Court of Appeals thoroughly considered the charges of petitioners and the denials of respond-

ent, and ordered that the Petition under Rule 60(b) be denied. (Appendix A to the Petition for Certiorari.)

Question I in the Petition.

The first question presented is whether the Petition under Rule 60(b) was timely filed. The Petition under Rule 60(b) was filed May 17, 1963, about fourteen months after the decision of the Court of Appeals (March 20, 1962). On May 21, 1963, the Court of Appeals ordered North Star to answer the Petition of May 17, 1963, within twenty days. (Record, CA 7, Order May 21, 1963.) On June 10, 1963, North Star filed its answer of 26 pages including 10 affidavits totaling 50 pages. (Petitioners' Appendix, B-2; Record, North Star Answer to Petition under Rule 60(b).) The answer vigorously denied the unfounded allegations of fraud and conclusively showed that in fact there was no fraud. (Record, North Star Answer, pages 4-9; item 4. on list of papers forwarded to this Court by Clerk of Court of Appeals—Appendix 1 herein.) The charges of fraud are baseless.*

With the Petition and the material from North Star's Answer before it, on July 30, 1963, the Court of Appeals denied the Petition under Rule 60(b) on the merits, stating:

> "The Court being fully advised of the issues raised by the Petition of Akshun Manufacturing Company, and the answer thereto filed by North Star Ice Equipment Company
>
> . . . . . .
>
> "IT IS FURTHER ORDERED, that the Petition filed by Akshun Manufacturing Company, that our judgment

* The document, Exhibit 20 (referred to on pages 10, 20 and 25 of the Petition) has always had a drawing like the one petitioners complain about (lower drawing, page 10 of the Petition); (Record, North Star Answer, page 16). Respondent placed Exhibit 20 in evidence in the District Court and included it as a part of the record before the Court of Appeals.

herein dated March 20, 1962 be vacated, and for alternative relief, be and the same is hereby denied." (Petitioners' Appendix, A-2.)

Subsequently, on August 28, 1963, petitioners delivered a request for rehearing to the Clerk of the Court of Appeals. The rules of the Court of Appeals for the Seventh Circuit do not provide for the filing of any such request, and the request for rehearing remained in the Clerk's office pending the further order of the Court. On November 5, 1963, the Court of Appeals ordered the request for rehearing to be filed and denied the same. In the order of November 5, 1963, the Court of Appeals restated the chronology of decisions and pleadings set out above and stated a second reason for denying the Petition under Rule 60(b) of May 17, 1963, *i.e.*, it was not timely as it was filed more than one year after the date of the decision of the Court.

The Court of Appeals' decision of July 30, 1963 (Appendix A to the Petition) denying the Petition under Rule 60(b) for lack of merit renders any question of timeliness of the filing of such Petition purely academic.

Question II in the Petition.

Question II in the Petition asks whether the Court of Appeals should exercise power to set aside its former judgment. The question is based upon the erroneous premise that Exhibit 21 is fraudulent. The order of presentation of Question I followed by Question II raises the erroneous inference that the Court of Appeals did not consider the merits of the Petition under Rule 60(b).

By the vehicle of North Star's Answer, accompanying affidavits, documents and physical exhibits of North Star ice removal tools, the Court of Appeals was fully informed and was able to decide that Exhibit 21 was truly repre-

sentative of all North Star tools; and that Exhibit 21 had the same structure, function and operation as all North Star tools.*

The Court of Appeals did exercise its power and correctly refused to set aside its former judgment by denying the Petition under Rule 60(b). (Appendix A to the Petition.)

The Court of Appeals, after considering the Petition under Rule 60(b), the evidence offered therewith, together with respondent's Answer and its accompanying proof, decided that the Petition's charges in relation to Exhibit 21 were unfounded. Question II is defective because it assumes a basic premise which is not true in fact and which was held by the Court of Appeals to be unfounded.

Question III in the Petition.

Question II recites allegations of fraud seeking relief under Rule 60(b)(3). Question III asks whether the allegations of Question II are capable of providing a basis for relief under Rule 60(b)(6) which reads "any other reason justifying relief from the operation of the judgment."

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*The decision of the Court of Appeals, March 20, 1962, held the patent limited to a knife to remove ice having a first part and a distinct second part. (Appendix C-5, C-6, C-7 to the Petition.)

Instead of such a knife, the North Star tools had a single inclined plane, a "simple flat surface sweeping the ice downwardly." (Appendix C-5 to the Petition.)

The Petition under Rule 60(b) sought to claim that North Star tools were of the two-part structure. (Record, Petition under Rule 60(b), pages 8-9.) Respondent's answer showed conclusively that all North Star tools had the single flat surface. (Record, Answer to Petition under Rule 60(b), pages 9-15.) The photographs (Petition, page 9) merely show the non-working side of the tools which do not engage ice. The Court of Appeals was fully advised of the structures by the Petition and Answer. (Appendix A-2 to the Petition.)

In regard to Rule 60(b)(6), Moore's Federal Practice, 2d Edition, Volume 7, Section 60.27(1), pg. 295, states:

> "It is important to note, however, that clause (6) contains two very important internal qualifications to its application: first, the motion must be based upon *some other reason than those stated in clauses (1)-(5)*; and second, the other reason urged for relief must be such as to *justify* relief." (Emphasis Moore's.)

Question III is only an attempt to restate Question II. Petitioners have failed to allege any reason other than the unfounded allegations of fraud in Question II.

CONCLUSION.

The Court of Appeals for the Seventh Circuit has carefully considered the grave charges of fraud and misrepresentation brought by the Petitioners. These charges (a fact question) have been denied and decided by the denial of a Petition under Rule 60(b) before the Court of Appeals. There is no substance to the charges and there is no reason which should compel this Court to grant a Writ of Certiorari. This Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN REX ALLEN,
JAMES C. WOOD,
LLOYD W. MASON,
Counsel for Respondent

HOFGREN, BRADY, WEGNER,
ALLEN & STELLMAN,
20 North Wacker Drive,
Chicago 6, Illinois,
Attorneys for Respondent.

March 4, 1964.

APPENDIX I.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing pages contain a true copy of:

1. The printed motion of Akshun Manufacturing Company, et al., to vacate judgment under Rule 60(b), or to move that it be vacated before the District Court, or to remand to the District Court, filed in this Court on May 17, 1963.

2. The petitioners' supporting affidavits, also filed in this Court on May 17, 1963. (Since only one copy was filed, it cannot be let go.)

3. The order, entered by this Court on May 21, 1963, directing North Star Ice Equipment Company twenty days to file an answer to motion of Akshun to vacate judgment, etc.

4. The answer of North Star Ice Equipment Company, filed in this Court on June 10, 1963.

5. The emergency motion of petitioners Akshun, et al. for leave to file within twenty days a reply to respondent North Star's answer, filed in this Court on June 13, 1963.

6. The attached brief in support of said emergency motion, filed in this Court also on June 13, 1963.

7. The affidavit of Patrick H. Hume and Granger Cook, Jr. in support of said emergency motion, also filed in this Court on June 13, 1963.

8. The order, entered by this Court on July 30, 1963, denying Akshun's emergency motion for leave to file reply to North Star's answer; further denying the motion to vacate judgment, etc.

9. The motion of Patrick H. Hume and Granger Cook, Jr. for leave to withdraw immediately as counsel for Akshun, filed in this Court on October 30, 1963.

10. The order, entered by this Court on November 5, 1963, granting leave to Patrick H. Hume and Granger Cook, Jr. to withdraw as counsel for defendants Akshun, et al.

11. The request for rehearing on petition to vacate judgment under Rule 60(b), received in this Court on August 28, 1963 and filed herein on November 5, 1963.

12. The order, entered by this Court on November 5, 1963, granting leave to file late petition for rehearing and also denying the same petition for rehearing.

13. The order, entered by this Court on November 20, 1963, authorizing and directing Clerk of this Court to return defendants' physical exhibit D-10 to Clerk of the U. S. District Court to be placed in the files of cause No. 57-C-1065.

Cause No. 13443.

AKSHUN MANUFACTURING COMPANY, and V & S ICE MACHINE COMPANY, INC.,

Defendants-Appellees,

vs.

NORTH STAR ICE EQUIPMENT COMPANY,

Plaintiff-Appellant,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto Subscribe my name and affix the seal of the United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this fourteenth day of January, 1964.

KENNETH J. CARRICK, *Clerk,*
By THOMAS F. STRUBBE,
Deputy Clerk of the United States Court of Appeals for the Seventh Circuit.

(SEAL)